

MEMORANDUM

TO: Finance/Executive Committee

FROM: Stacey Abrams
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DATE: May 6, 2003

RE: Summary of Proposed Atlanta Living Wage Ordinance Including
Legal and Policy Concerns.

The following memorandum has three purposes: (1) it summarizes the major provisions of the Living Wage Ordinance ("LWO") as currently proposed; (2) it answers those legal questions put before the Law Department and offers suggestions for additional changes based on review by the Law Department; and (3) it distinguishes those questions raised by City Council members that the Law Department believes to be policy questions rather than legal questions.

It is the intention of the Law Department to monitor the work sessions and public hearings and to assist the City Council in revising the LWO to meet the legal and policy ends, as directed.

Summary of 03-O-0409

Note: This summary does not track the language of the ordinance exactly, but instead summarizes major provisions thereof.

Section 1. Title and Purpose.

This section lays out the purpose of the ordinance:

- to ensure that private businesses receiving taxpayer-funded benefits pay their employees a wage that meets basic needs and avoids economic hardship.
- to mandate that private businesses practice pay equity between the wages of female and male employees;
- to prohibit the use of taxpayer funds to encourage or discourage workers from joining a union; and
- to give reasonable access to all parties who want contact with employees on City property.

Section 2 - Effective Date, Duration of Coverage and Counting Employees.

- (a) **Effective Date:** The ordinance takes effect 90 days after passage. However, compliance with the ordinance is not required until January 1, 2004.
- (b) **Application to Contracts:** The ordinance applies to renewals or extensions of contracts, subcontracts, leases and financial assistance only in the event that the City has the discretion not to renew or extend the agreement.
- (c) **Duration of Coverage:** The ordinance applies for the duration of any Contract, Lease or City Financial Assistance as set by the contract. Also, if the City Financial Assistance has no defined duration, the duration is automatically five years.
- (d) **Additional Application:** The ordinance also applies to subcontractors, tenants or subtenants providing services relating to the City Contract or at the site that is the subject of the City Financial Assistance or City Lease. For example, this would apply to concessionaires at the Airport or subtenants at any leased city property.
- (e) **Rules for counting employees:** All employees of the business are covered if they are working on a City project (regardless of whether they are temporary, part-time or full-time). Also, current and future employees

must be counted when the business determines if the ordinance applies. If fewer than 15 employees are employed at the beginning of a City Contract, but they later exceed this number, the business must notify the City Compliance Official within 30 days of that change in coverage status.

Section 3 – Definitions.

(a) Covered Employer – The City, a Contractor or a Beneficiary.

(b) City – This term includes:

- the City of Atlanta;
- any agency of the City of Atlanta;
- any public authority or agency where a majority of the governing board is appointed by City officials or which receives public funds from the City;
- the Hartsfield Atlanta International Airport; and
- any public authority, agency or entity operating a sports or recreational facility that is controlled or partly funded by the City .

(c) City Contract – This refers to any contractual agreement between the City and a private party where the following conditions are met:

- the contracts has an annual value of payments is \$25,000 or more, or
- if one person or entity receives more than one contract during a 12 month period, all such contracts shall be deemed City Contracts if the aggregate value exceeds \$25,000.
- **Exclusion:** Any contract with the City to provide construction services or other work that is subject to city, state or federal prevailing wage laws are excluded from the operation of the ordinance.

(d) City Financial Assistance or City Financial Assistance Award- This includes any grant, loan, tax incentive or abatement, tax increment financing, bond financing, subsidy or other form of financial assistance awarded by or with the approval of the City with an aggregate annual value of \$50,000 or more.

- For example, this would apply to nonprofit corporations or private entities in receipt of these benefits.
- As with the definition of City Contract, the Financial Assistance definition takes into account an aggregate value of \$50,000 where a person or entity receives more than one award of financial assistance, and the definition also excludes construction services or other work that is subject to city, state or federal prevailing wage laws.

- (e) **City Lease** - any agreement that authorizes any party to occupy, use, control or do business at property owned or controlled by the City.
- (f) **Beneficiary** - This language includes the following:
- any **person** or **business** having at least 15 employees that receives City Financial Assistance or of a City Lease; or
 - a **tenant, subtenant, or concessionaire** of a recipient of City Financial Assistance or of a City Lease; or
 - a **contractor** or **subcontractor** of a recipient of City Financial Assistance or of a City Lease.
- (g) **Contractor** - any person or business having at least 15 employees that is a party to a City Contract or is a subcontractor that provides services relating to performing the City Contract.
- (h) **Employee** - full-time, part-time, temporary, seasonal or contracted temporary agency persons who are employed by the City, a Contractor or a Beneficiary.
- **Exclusions:** (1) persons employed in construction or other work that is subject to prevailing wage laws; (2) persons under the age of 18; summer youth workers or workers engaged in a training program not to exceed 60 days in duration; or (3) students participating in an intern program.
- (i) **City Compliance Official or CCO** - the person or agency designated by the Mayor to be charged with the responsibility for implementation and enforcement of the ordinance.

Section 4 - Living Wage and Health Benefits.

- (a) **Benefits Mandated by LWO:** A Covered Employer must pay Employees for all hours worked for the City, performing a City Contract or at a site or project that is the subject of City Financial Assistance or a City Lease:
- no less than a Living Wage of \$10.50 per hour with health benefits or
 - no less than \$12.00 per hour without health benefits.
 - The Living Wage amount is subject to annual upward adjustments based upon the Consumer Price Index.

- (b) Adjustments to Amount:** By December 1 of each year, the City is required to publish the adjusted Living Wage and Health Benefit Supplement Rates.

Section 5 – Paid Days Off.

Covered Employers are required to provide Employees

- at least 12 paid days off per year,
 - this leave cannot be used until after the first 6 months unless the employer has a more generous policy
 - the employer may count towards these 12 days the number of paid holidays and days off that it independently provides
- at least an additional 10 non-paid days off per year for sick leave where the Employee has exhausted his/her compensated leave, but these requirements do not apply to those covered under the Family Medical Leave Act.

Section 6 – Pay Equity.

- This section requires Covered Employers to pay a wage that is sufficient to eliminate wage disparities paid to employees of comparable skill and training in job titles or classifications primarily occupied by women as compared to job titles and classifications primarily occupied by men.

Section 7 – No Conflict with other Labor Standards.

- Provides that nothing in the ordinance shall be construed as prohibiting or conflicting with any other obligation or law, including any collective bargaining agreement that mandates the provision of higher or superior wages, benefits, or protections to employees.
- This section also provides that no part of the ordinance will be enforceable or applicable where its provision is pre-empted by federal or state law.
- Provides that requirements of the ordinance may be waived by the terms of a bona fide collective bargaining agreement provided that the ordinance is expressly referenced in the agreement.

Section 8 – Retaliation Prohibited.

- Provides that it shall be unlawful for a Covered Employer or any other party to take any action in retaliation for the exercise of one's rights protected under the ordinance.

Section 9 – Ban on Use of Public Funds for Inappropriate Activities and Equal Access to Public Property.

- Provides that no Covered Employer may use City funds for the purpose of persuading employees to support or oppose unionization or
- that a Covered Employer who operates on property owned or controlled by the City must ensure that the property be used in a viewpoint-neutral fashion and
- that both the Covered Employer and labor unions shall be accorded reasonable opportunity to communicate with employees there.

Section 10 – Certification Agreements for Contractors and Beneficiaries.

- (a) **Purpose:** In order to be eligible for a City Contract, Lease or Financial Assistance, the applicant must certify that it will comply with the provisions of the ordinance.
- (b) **Who must submit:** Contractors or Beneficiaries along with their contractors, subcontractors, tenants or subtenants, are required to file a Certification Agreement with the department or agency of the City responsible for awarding the City Contract, City Lease or City Financial Assistance. Contractors or Beneficiaries are further required to file an updated Certification when their contractors, subcontractors, tenants or subtenants are added or substituted.
- (c) **What will be included:** The information to be included in the Certification Agreement shall be completed on a form provided by the CCO and shall contain certain specified information related to the contract, financial assistance or lease, along with information concerning the Contractor or Beneficiary.
- (d) **Penalties for failure to comply:** Failure to provide the Certification Agreement prior to entering into the transaction shall void any such contract, financial assistance or lease.
- (e) **Correction:** The above failure may be corrected by filing the Certification Agreement within 5 business days of notice of the omission and compensating within 15 calendar days, each employee for all wages and benefits that should have been paid during that period.

Section 11 – Monitoring and Reporting Requirements

- (a) **Who is responsible for monitoring:** The CCO shall coordinate and monitor compliance with the ordinance and shall report any violations to the City Attorney.
- (b) **Annual Reporting:** Covered Employers and their contractors, subcontractors, tenants and subtenants are required to file an Annual Report with the CCO by December 1 of each year identifying
- each employee,
 - total hours worked by the employee,
 - the hourly wage which was paid,
 - the hourly cost to the employee of any health benefit provided, and
 - the employee's gender and job classification.
 - the number of persons that are paid less than the Living Wage and Health Benefits along with an explanation of why they are believed not to be covered by the ordinance.
 - the Pay Equity reporting information required by Section 6(e) of the ordinance.
- (c) Covered Employers (including their contractors, subcontractors, tenants and subtenants) are also required to:
- retain payroll records for a 4 year period; and
 - post an explanation of the current Living Wage and Health Benefits Rates and other worker protections granted by this ordinance.
- (d) The ordinance requires the creation of a cooperative oversight board to monitor the implementation and enforcement of the ordinance.

Section 12. Implementation and Enforcement.

- (a) Requires the CCO to promulgate rules and regulations to implement the ordinance.
- (b) Requires a public hearing and review and comment by the City Council to establish the rules and regulations, and the rules and regulations will have the force and effect of law.
- (c) The CCO is required to provide an annual report to the public and the City Council on the implementation and enforcement of the ordinance during the preceding year.

- (d) Places investigatory and administrative remedies in the CCO where there have been alleged violations of the ordinance and authorizes the CCO to order action necessary to correct the violation, if found.
- (e) Allows for alleged violations of the ordinance to be prosecuted in Municipal Court.
- (f) Gives the City the Authority to pursue legal actions for alleged violations of the ordinance.
- (g) Grants a private right of action to persons alleging a violation or violations of the ordinance.

Section 13 - Remedies Not Exclusive.

- Provides that the remedies provided by this ordinance shall not preclude a person's right to bring legal action for the violation of any other laws concerning wages and hours.

Section 14 - Severability.

- Provides that the finding of a court that any provision of the ordinance is invalid shall not affect the validity of the remaining provisions of the ordinance.
- **Repealer** . The final section contains the standard repealer provisions.

Legal Considerations

1. **Section 11(e) - Oversight Board.** The LWO creates an oversight board. We would recommend the inclusion of language explaining the appointment process and the number of members.
2. **Section 12(b) - Administrative Remedies.** The current language of the ordinance vests certain powers with the CCO, which is an inappropriate delegation of executive powers under the Georgia Constitution and City Charter. We would recommend the following language; “The CCO may recommend to the Mayor any relief appropriate to remedy the violation including, but not limited to...”
3. **Section 12(c) - Misdemeanor Prosecution.** The LWO may not create a misdemeanor that imposes a fine; however, it may include provisions for prosecution. We recommend the following language: **Prosecution.** Violation of the requirements of this article shall be prosecuted in the municipal court.
4. **Section 12 (e) - Civil Action by Private Party.** The LWO creates a private right of action, which is beyond the purview of the City of Atlanta. We recommend striking this language in its entirety.
5. **Home Rule** –The LWO may implicate O.C.G.A. §36-35-6(b), which places limitations on the home rule powers of municipalities in this state. There is a paucity of reported case law where this code section has been addressed. The code section provides that cities are not empowered “to take any action affecting the private or civil law governing private or civil relationships, except as is incident to the exercise of an independent governmental power.” The home rule act also precludes cities from taking “any action affecting the private or civil law governing private or civil relationships, except as is incident to the exercise of an independent governmental power.” O.C.G.A. § 36-35-6(b).

Notwithstanding the foregoing, however, we are of the opinion that if the Living Wage Ordinance is enacted and is challenged in a court of law, a defensible argument can be made that the city’s contracting procedures constitute “the exercise of an independent governmental power,” and, further, that it complies with the requirements of O.C.G.A. §36-35-3(a) in that the ordinance is a clearly reasonable ordinance relating to the property, affairs and local government of the City for which no provision has been made by general law and which is not inconsistent with the Constitution or any charter provision applicable thereto.

6. Conflicts with Minimum Wage Laws: The LWO may be challenged as conflicting with the State Minimum Wage Law, which establishes an hourly minimum wage rate of \$5.15 per hour. O.C.G.A. §34-4-3. We are of the opinion that it does not, as the Minimum Wage Law sets a floor but not a ceiling for wages. In *City of Atlanta v. Associated Builders and Contractors of Georgia, Inc.* 240 Ga 655 (1978), the constitutionality of a city ordinance requiring workers on construction projects in excess of \$10,000, which are funded by the city, be paid a minimum wage corresponding to the federal Davis-Bacon Act wage scale was challenged. The Court found no unconstitutional conflict between the state minimum wage law and the city ordinance. The Court further found that “the Local minimum wage law does not detract from or hinder the operation of the state law, but rather it augments and strengthens it.”

Policy Questions to be Considered by Council

1. Application of the ordinance:

- (a) Whether nonprofit, tax-exempt organizations should be exempt from the ordinance and to what extent?
- (b) Whether the ordinance should specifically exclude contracts for goods and contracts with other governmental entities.

2. Waiver Provisions – Whether the ordinance should include waiver provisions for emergency and sole source contracts?

3. Aggregate Contract Values – Whether the ordinance should be limited to specifically designated service contracts of \$25,000 or more rather all service contracts of \$25,000 or more.

4. Impact on City – What would be the economic and financial consequences and impact to the City?

5. Impact on Businesses – What would be the economic and financial consequences and impact to businesses that contract with the City?